



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA-R01-OAR-2014-0796; EPA-R01-OAR-2014-0862; FRL-9926-73-Region 1]**

#### **Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Nonattainment New Source Review and Prevention of Significant Deterioration Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to conditionally approve the New Hampshire November 15, 2012 State Implementation Plan (SIP) revisions that are intended to ensure that the State's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) programs are consistent with the federal PSD and NNSR program requirements. In a letter dated March 20, 2015, the New Hampshire Department of Environmental Services (NH DES) committed to revising its regulations no later than one year from the date when EPA publishes a notice of final conditional approval, and to submitting the revised regulations to EPA for approval into the SIP. EPA is also proposing to fully approve a July 1, 2003 SIP revision that clarifies two definitions related to New Hampshire's permitting programs. These actions are being taken in accordance with the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R01-OAR-2014-0796 by one of the following methods:

1. **www.regulations.gov**: Follow the on-line instructions for submitting comments.
2. E-mail: [mcdonnell.ida@epa.gov](mailto:mcdonnell.ida@epa.gov)
3. Fax: (617) 918-0653
4. Mail: "Docket Identification Number EPA-R01-OAR-2014-0796", Ida McDonnell, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square - Suite 100, (Mail code OEP05-2), Boston, MA 02109 - 3912.
5. Hand Delivery or Courier. Deliver your comments to: Ida McDonnell, Manager, Air Permits, Toxics, and Indoor Programs Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, 5 Post Office Square - Suite 100, (mail code OEP05-2), Boston, MA 02109 - 3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

*Instructions:* Direct your comments to Docket ID No. EPA-R01-OAR-2014-0796. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through [www.regulations.gov](http://www.regulations.gov), or e-mail, information that you consider to be CBI or otherwise protected.

The [www.regulations.gov](http://www.regulations.gov) website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Air Permits, Toxics and Indoor Programs Unit, 5 Post Office Square - Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office’s official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

In addition, copies of the state submittal and EPA's proposed approval and technical support document are also available for public inspection during normal business hours, by appointment at the Air Resources Division, New Hampshire Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095.

**FOR FURTHER INFORMATION CONTACT:** Brendan McCahill, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square - Suite 100, (mail code OEP05-2), Boston, MA 02109 - 3912, telephone number (617) 918-1652, Fax number (617) 918-0652, email [mccahill.brendan@EPA.GOV](mailto:mccahill.brendan@EPA.GOV)

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

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# **I. What action is EPA proposing in this document?**

EPA is proposing three actions in this document. First, EPA is proposing to conditionally approve revisions to the New Hampshire PSD program under PART Env-A 619, "Prevention of

Significant Deterioration.” EPA originally proposed approval of the State’s PSD program revisions on January 21, 2015. See 80 FR 2860. EPA is reproposing to approve the State’s PSD program as a conditional approval because subsequent to EPA’s January 21, 2015 **Federal Register** document, EPA concluded that New Hampshire’s regulations did not contain a provision, consistent with 40 CFR 51.166(q)(2)(iv), requiring notice of a draft PSD permit to state air agencies whose lands may be affected by emissions from the permitted source. In a letter from New Hampshire dated March 20, 2015, the State committed to revise its regulations, no later than one year from EPA’s notice of a final conditional approval, to include the additional public notice procedure in its regulations and to submit the revision to EPA for approval into the SIP.

EPA is also proposing to conditionally approve revisions to New Hampshire’s NNSR program SIP submitted on November 15, 2012. The approval is conditioned on New Hampshire submitting in a timely manner two requirements missing from its rules: 1) provisions that meet the federal regulations for “reasonable possibility,” applicable to projects at major stationary sources that are not major modifications based on the actual-to-projected actual test but have a “reasonable possibility” of resulting in a significant emission increase; and 2) provisions stating that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, state or federal law. In a letter dated March 20, 2015, the NH DES committed to revising its NNSR regulations to include the requirements above and to submitting the revised regulations to EPA for approval into the SIP.

Finally, EPA is proposing to approve New Hampshire's July 1, 2003 SIP revision that modifies two definitions in PART Env-A 101, "Permit definitions:" 1) "minor permit amendment," and 2) "state permit to operate." These revisions are intended to clarify the State's definitions relevant to certain permitting transactions and to render them consistent with the requirements in the State's permitting rules.

## **II. Why is EPA reproposing its January 21, 2015 proposed approval of New Hampshire's November 15, 2012 PSD program SIP submittal?**

EPA's original proposal to approve the November 15, 2012 revisions to New Hampshire's PSD program is described in detail in the January 21, 2015 **Federal Register** document. See 80 FR 2860. In the document, EPA noted that public participation requirements for New Hampshire's PSD program were first approved in October 28, 2002. In the November 15, 2012 submittal, New Hampshire renumbered its State citation for the public notice procedures but did not include any substantive revisions to the language. However, after reviewing New Hampshire's rules to determine compliance with the federal infrastructure SIP requirements under CAA section 110, EPA concluded that New Hampshire's regulations did not contain a provision, consistent with 40 CFR 51.166(q)(2)(iv), requiring notice of a draft PSD permit to be sent to state air agencies whose lands may be affected by emissions from the permitted source. As noted above, EPA is now proposing to conditionally approve New Hampshire's PSD program based on the State's commitment to revise its regulation and to submit it to EPA for approval into the SIP.

## **III. What comments did EPA receive during the comment period for New Hampshire's PSD proposed program approval?**

EPA received one comment from Earthjustice during the comment period for the proposed approval of the PSD program. Earthjustice commented that EPA's January 21, 2015 document proposing approval for the State's PSD program was confusing and should have more clearly stated that New Hampshire *did not* incorporate by reference the significant impact levels (SILs) for Particulate Matter less than 2.5 microns (PM<sub>2.5</sub>) into its PSD SIP. EPA agrees that its January 21, 2015 document should have been written more clearly on that point. On January 22, 2013, the United States Court of Appeals for the District of Columbia Circuit granted a request from EPA to vacate and remand the portions of the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (40 CFR 51.166(k)(2) and 40 CFR 52.21(k)(2)) addressing the SILs for PM<sub>2.5</sub> so that EPA could voluntarily correct an error in these provisions. See *Sierra Club v. EPA*, 705 F.3d 458, 463-66 (D.C. Cir. 2013). (The court declined to vacate the SILs provision at 40 CFR 51.165(b)(2) that did not contain that same error. *Id.*) EPA here confirms that New Hampshire's November 12, 2012 proposed PSD revisions did not incorporate by reference the PM<sub>2.5</sub> SIL provision under 40 CFR 51.166(k)(2). EPA is also confirming that we are not approving 40 CFR 51.166(k)(2) into the SIP.

#### **IV. What action is EPA proposing for New Hampshire's NNSR SIP submittal?**

New Hampshire's November 15, 2012 SIP submittal also included revisions to the State's NNSR program at PART Env-A 618, "Nonattainment New Source Review." The revisions incorporated by reference into the State's regulations, at PART Env-A 618 "Nonattainment New Source Review," consist of many of the provisions of the federal NNSR program codified in the July 1, 2011 edition of 40 CFR 51.165. New Hampshire incorporated those provisions which are appropriate for state implementation (with the exception of certain permit application and public



notice requirements for which New Hampshire submitted its own equivalent language and with the exception of two definitions for which New Hampshire established its own language, as described below). EPA's Technical Support Document (TSD) sets forth in detail which provisions of 40 CFR 51.165 were incorporated by the State and which were not. EPA's TSD is available as part of the docket and administrative record for this action. The State's NNSR submittal requested that EPA approve the revisions into the State's SIP-approved NNSR program. The State's submitted NNSR program includes provisions that comply with the requirements in EPA's December 31, 2002 Final NSR Improvement Rules and EPA's May 16, 2008 Final Rules Governing the Implementation of NSR for Fine Particulate Matter (i.e., particulate matter less than 2.5 micrometers (PM<sub>2.5</sub>)). EPA is proposing to conditionally approve PART Env-A 618 because the State's submittal did not include: 1) provisions for "reasonable possibility" established in 40 CFR 51.165(a)(6) and (a)(7); and 2) provisions required under 40 CFR 51.165(a)(5)(i) providing that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law. By letter dated March 20, 2015, the State committed to revise its regulations and to submit them to EPA for approval into the SIP no later than one year from the date of EPA's notice of a final conditional approval. We also note that PART Env-A 618, on which EPA is today taking action, will supersede all other versions of the NNSR rules earlier approved by EPA into New Hampshire's SIP.

*A. What is the background for New Hampshire's November 15, 2012 NNSR program SIP submittal?*

New Hampshire's November 15, 2012 SIP submittal adopting provisions from the July 1, 2011 edition of 40 CFR 51.165 (with the exceptions mentioned above and described in more detail in EPA's TSD) into the SIP, involves the addition of several major changes to the State's NNSR rules since EPA last approved the State's NNSR program on July 27, 2001. As mentioned earlier, the exact provisions of the federal regulations which are and are not being incorporated by reference into the New Hampshire SIP in this action are contained in EPA's TSD for this rulemaking. The new NNSR provisions, i.e., those that are different than the NNSR provisions earlier approved by EPA into New Hampshire's SIP, are summarized below in the next two sections (IV.B. and IV.C) of this document. The State's November 15, 2012 SIP submittal retains much of the substantive content of the major NNSR rule provisions last approved into the SIP on July 27, 2001 but also incorporates changes to the federal regulations that occurred since that time, i.e. in December 2002. The already existing provisions include, among other things, requirements for major stationary sources to obtain emission reductions ("offsets") from existing stationary sources to ensure new stationary sources do not interfere with state plans to achieve the National Ambient Air Quality Standards (NAAQS) and requirements that major stationary sources apply emissions controls that constitute the lowest achievable emission rate (LAER) which is derived from the most stringent emission limitation contained in any state implementation plan or achieved in practice for that class or category of stationary source.

*B. What revisions did EPA make in December 31, 2002?*

EPA issued a Final Rule entitled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control

Projects” (67 FR 80185, December 31, 2002). The rule made a number of changes to the applicability requirements of the federal NNSR rule including the following:

- A new definition of “actual emission baseline” that defines an emission unit’s pre-modification actual emissions;
- New “Applicability Procedures” under 40 CFR 51.165(a)(2) that define the test method used to calculate the emission increase from the construction or modification of new or existing emission units;
- The expansion of the “Actual-to-Projected Actual” applicability test to determine if projects at non-Electric Utility Steam Generating Units (non-EUSGU) are major modifications. (The pre-2002 federal NSR regulations restricted the Actual-to-Projected Actual applicability test to EUSGUs only);
- New procedures requiring stationary sources to monitor, keep records and report emissions from projects at existing emission units if there is a reasonable possibility (as defined in 40 CFR 51.165(a)(6)(vi)) that a project that is determined pre-construction not to be a major modification may actually in the future result in a significant emission increase; and
- The addition of the optional “Plantwide Applicability Test” (PAL) for all source categories.

The **Federal Register** document for the December 2002 NSR rule gave state permitting agencies until January 2, 2006 to submit SIP amendments that implemented the new federal revisions or, if a state permitting agency did not submit any SIP amendments or submitted amendments that differed from the federal rules, a demonstration showing that its existing permitting program or

amended permitting program is at least as stringent as EPA's revised program. In addition, federal regulations governing SIP-approved NNSR rules at 40 CFR 51.165 "Permit Requirements" require that all state plans use the specific definitions as promulgated by EPA. Deviations from the federal definitions will be approvable by EPA only if the state specifically demonstrates that the submitted definition is more stringent than, or at least as stringent in all respects as, the corresponding federal definition.

The final document for the December 2002 NSR rule at [http://www.epa.gov/NSR/fr/20021231\\_80186.pdf](http://www.epa.gov/NSR/fr/20021231_80186.pdf) provides a full description of the NSR improvements, the requirements for SIP submittals, and the final amended federal rule for SIP-approved NNSR programs at 40 CFR 51.165 "Permit Requirements."

*C. What revisions did EPA make in May 16, 2008?*

EPA issued a Final Rule governing the implementation of NSR for PM<sub>2.5</sub>. (73 FR 28321, May 16, 2008). The rule includes the new major stationary source applicability threshold level for major stationary sources of PM<sub>2.5</sub>. A stationary source is defined as a major stationary source and subject to the PM<sub>2.5</sub> NNSR requirements if it emits 100 or more tons per year (tpy) of PM<sub>2.5</sub>.

The rule also identified the following list of pollutants that contribute to PM<sub>2.5</sub> formation and a description of whether the pollutant, as a precursor to PM<sub>2.5</sub>, is regulated under the NNSR rules.

- Direct emissions of PM<sub>2.5</sub> – regulated under the NNSR rule;
- Sulfur dioxide (SO<sub>2</sub>) – regulated under the NNSR rule;

- Nitrogen oxides (NO<sub>x</sub>) – regulated under the NNSR rule unless the state demonstrates that NO<sub>x</sub> emissions are not a significant contributor to the formation of PM<sub>2.5</sub> for an area(s) in the state;
- Volatile organic compounds (VOC) – not regulated under the NNSR rule unless the state demonstrates that VOC emissions are a significant contributor to the formation of PM<sub>2.5</sub> for an area(s) in the state; and
- Ammonia – not regulated under the NNSR rule unless the state demonstrates that ammonia emissions are a significant contributor to the formation of PM<sub>2.5</sub> for an area(s) in the state.

The rule also identifies the following significant emission rates used to determine if increases in direct emissions of PM<sub>2.5</sub> or increases in PM<sub>2.5</sub> precursors from a construction project at an existing facility result in major modifications that are then subject to the NNSR rule:

- Direct PM<sub>2.5</sub> emissions - 10 tons per year (tpy)
- SO<sub>2</sub> emissions - 40 tpy
- NO<sub>x</sub> emissions - 40 tpy
- VOC emissions (if regulated) 40 tpy unless the state demonstrates that a lower rate is appropriate.

## **V. What is EPA's analysis of New Hampshire's proposed NNSR program SIP revisions?**

*A. What requirements did EPA apply in deciding to propose conditional approval of New Hampshire's SIP submittal?*

Section 110(a)(1) of the CAA requires each state to submit to EPA a plan which provides for the implementation, maintenance and enforcement of each NAAQS. These plans, generally referred to as the SIP, include numerous air quality monitoring, emission inventory, and emission control requirements designed to obtain and maintain the NAAQS within the state. The CAA requires states to adopt SIP revisions into state regulations and to submit the revisions to EPA for approval into the state's SIP. Section 110(l) of the CAA states that EPA shall not approve a revision to the SIP if the revision would interfere with any applicable requirement concerning attainment (of the NAAQS) and reasonable further progress (as defined in CAA section 7501) or any other requirement of the CAA.

*B. What provisions did New Hampshire include in its November 15, 2012 NNSR SIP submittal?*

New Hampshire's November 15, 2012 SIP submittal added or revised the following provisions to its NNSR Program under PART Env-A 618 Nonattainment New Source Review. The provisions include requirements from 40 CFR 51.165 previously incorporated by reference into New Hampshire's SIP on July 27, 2001, additional or amended requirements contained in the July 2011 version of 40 CFR 51.165, and certain new and previously approved state permit program requirements, including permit application and permit issuance procedures and other requirements necessary to implement the NNSR program.

- PART Env-A 618.01: Purpose
- PART Env-A 618.02: Applicability
- PART Env-A 618.03: Definitions
- PART Env-A 618.04: Owner or Operator Obligations
- PART Env-A 618.05 Implementation Plan Requirements

- PART Env-A 618.06: Permit Application Requirements
- PART Env-A 618.07: Emission Offset Requirements
- PART Env-A 618.08: Procedure for acquiring and Implementing Emission Offsets
- PART Env-A 618.09: Establishing a PAL
- PART Env-A 618.10 Department Review and Public Notice

The following is a description of each section.

PART Env-A 618.01 Purpose defines the purpose of the part to implement the NNSR program as set forth in sections 171 through 193 of the CAA and the July 1, 2011 edition of 40 CFR 51.165.

PART Env-A 618.02 Applicability identifies the stationary sources subject to the state NNSR program: new major stationary source or major modifications of a regulated NSR pollutant located in an area designated as nonattainment under 40 CFR 81.330, or new major stationary sources or major modifications for NO<sub>x</sub> or VOC if the stationary source is located in the Northeast Ozone Transport region (OTR) as defined in PART Env-A 618.03(b)(3).

The section also requires projects to use emission calculations described in 40 CFR 51.165(a)(2)(ii)(A) through (F) to determine if the project is a new major stationary source or new major modification.

In addition, if a new stationary source or modification is determined to be a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation

established after August 7, 1980 on the capacity of the stationary source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the provisions of this part shall apply to the stationary source or modification as though construction had not yet commenced on the stationary source or modification.

PART Env-A 618.03 Definitions adopts the specific definitions contained in the July 1, 2011 edition of 40 CFR 51.165(a)(1) and (f)(2) with the following clarifications: the NH DES revised the federal definitions of “Baseline actual emissions” and “Reasonable period.” An analysis of the State’s revisions to the federal definitions of the terms “Baseline actual emissions” and “Reasonable period” is found in section V.D of this document. The section also included five additional definitions not specifically defined in the federal NNSR regulations, but relevant to the program: “Emission offset,” “Emission offset ratio,” “Northeast Ozone Transport Region,” “Offset source,” and “Ozone season.”

PART Env-A 618.04 Owner or Operator Obligations includes the following requirements:

- the owner or operator of any new major stationary source or major modification subject to this part shall comply with LAER;
- obtain offsets for the increase in emissions for the project in accordance with PART Env-A 618.07; and
- obtain a NNSR permit prior to commencement of construction.

In addition, the owner or operator of an existing major stationary source with a Plantwide applicability limit (PAL) shall comply with the provisions of its PAL.



PART Env-A 618.05 Implementation Plan Requirements ensures, in accordance with section 173(a)(4) of the CAA, that NH DES will not issue a permit or permits to a stationary source to which the requirements of PART Env-A 618 apply if the EPA Administrator has determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed stationary source is to be constructed or modified.

PART Env-A 618.06 Permit Application Requirements identifies the procedures to file with NH DES, NNSR and PAL permit applications. The section also identifies the items that should be included in an application including : 1) a control technology evaluation to demonstrate that a new major stationary source or major modification will meet LAER; 2) a documented plan to obtain creditable emission reduction offsets in accordance with PART Env-A 618.07; 3) a demonstration showing that all major stationary sources in New Hampshire under common ownership are in compliance; and 4) an analysis of alternative sites, sizes, production processes, and an environmental control techniques demonstration showing the benefits of the proposed stationary source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. In addition, a PAL application shall contain information required pursuant to 40 CFR 51.165(f)(3).

PART Env-A 618.07 Emission Offset Requirements identifies the requirements for offsets including, but not limited to, defining: 1) the use of actual emissions from the stationary source providing offset credits as the baseline for determining emission offsets; 2) the offset ratio requirements for different ozone nonattainment designations; and 3) the location requirements

restricting where a stationary source may obtain offsets. The section includes requirements for a stationary source seeking offsets to demonstrate that the stationary source of the offsets causes or contributes to a violation of a NAAQS in the nonattainment area which the new or modified stationary source is proposed to be located. The section also requires that offsets obtained outside of New Hampshire be subject to a federally enforceable permit or other federally enforceable document approved by the state or governing jurisdiction in which the offset stationary source is located.

The section also states that offsets shall not include: 1) Any reductions from compliance, or scheduled compliance, with applicable rules in effect prior to the permit application of the new or modified stationary source; 2) Reductions required to meet RACT or acid deposition provisions of the Act, as stipulated in the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 FR 13553, III.G.2.e; or 3) Reductions required to meet any other provisions of Env-A 100 et seq. and the Act.

PART Env-A 618.08 Procedures for Acquiring and Implementing Emission Offsets identifies requirements for owners and operators to document the offset pollutant, actual and potential estimates of each new pollutant, the offset stationary source and location, the actual and allowable annual estimate of each pollutant for the offset stationary source prior to the effective date of the offset, potential annual estimates of each pollutant of the new stationary source after the effective date of the offset, and for NO<sub>x</sub> and VOC emissions, the ozone season annual emissions estimate from the new stationary source.

The section also requires stationary sources obtaining offsets from outside New Hampshire to file documentation with the NH DES verifying that the offset stationary source has obtained a federally enforceable permit or other federally enforceable documentation for the emission reduction control measures pertaining to the offsets for the new stationary source.

The section also allows the use of emission reduction credits (ERCs) in accordance to PART Env-A 3006.04 to satisfy NNSR emissions offset requirements. Stationary sources may also use discrete emission reductions (DERs) to meet the offset requirements provided the DERs comply with the requirements of section 173 of the Act, 40 CFR 51.165(a) and PART Env-A 3108.02.

Env A 618.09 Establishing a PAL identifies the requirements to establish and implement a PAL in accordance with 40 CFR 51.165(f)(1), (4) and (6) through (14) except that public participation procedures identified in PART Env-A 618.10(b) and (c) shall be used.

PART Env-A 618.10 Department Review and Public Notice requires stationary sources applying for a PAL permit to file an application. The regulation specifies that NH DES will address all material comments received during the comment period before taking a final action on a PAL permit application. Applications to comply with NNSR or to establish a PAL permit shall be subject to the public notice procedures specified in PART Env-A 621.04 including the requirement for a 30-day public notice and comment period and permit appeal procedures under the state judicial review regulations.

*C. How did the New Hampshire November 15, 2012 NNSR SIP submittal meet new and existing NNSR program requirements?*

With the exception of the definitions of the terms “Baseline actual emissions” and “Reasonable period,” the NH DES’s November 15, 2012 SIP submittal incorporated by reference into the State regulation the definitions for a SIP-approved nonattainment NSR program under 40 CFR 51.165(a)(1) and the definitions for PALs under 40 CFR 51.165(f)(2). The submittal also included five additional definitions: “Emission offset,” “Emission offset ratio,” “Northeast Ozone Transport Region,” “Offset source,” and “Ozone season” for the purpose of clarifying the State’s NNSR requirements. The definitions for “Emission offset,” “Emission offset ratio” and “Ozone season” were previously approved by EPA into the SIP and clarify the offset requirements under New Hampshire’s NNSR program. The definition for the “Northeast Ozone Transport Region” was also previously approved by EPA into the SIP and means the same geographical area as defined under Section 184(a) of the CAA. The definition of “Offset source” replaces the previously approved SIP definition of “Offset donor source” and identifies potential sources of emissions from which a new or modified stationary source may obtain emission offsets. The additional definitions help clarify the offset requirements under New Hampshire’s NNSR program and are consistent with all federal requirements under the CAA for approval into the SIP.

By incorporating by reference the federal provisions under 40 CFR 51.165 (with the exceptions noted earlier and in EPA’s TSD) the vast majority of the State’s proposed SIP revisions satisfy the existing SIP-approved NNSR program requirements approved on July 27, 2001, the

December 31, 2002 NSR Improvement Rule, and the May 16, 2008 PM<sub>2.5</sub> NSR Rule.<sup>1</sup> The two conditional approval issues that are missing from New Hampshire's submittal are described earlier and later in this document.

The NH DES submittal also expanded upon the emissions offset provisions previously approved into the SIP. As noted, the submittal includes a new definition for "Emission offset" under PART Env-A 618.03 requiring reductions in pollutants achieved at an existing stationary source to meet criteria specified in 40 CFR 51.165(a)(3). The NH DES also included two new sections in the NNSR program; Env 618.07, "Emission Offset Requirements" and Section PART Env-A 618.08, "Procedure for Acquiring and Implementing Emissions Offsets."

As described above, PART Env-A 618.07 identifies the specific provisions applicable to all offset emissions. These provisions include requirements that offsets : 1) be surplus; 2) obtained from an area designated with an equal or higher nonattainment classification; 3) obtained in an amount equal to or exceeding a one-to one ratio, or another ratio as required by the nonattainment designation; and, 4) if obtained outside the designated area where the new stationary source or modification is to be constructed, a demonstration that the offsets cause or contribute to a violation of the NAAQS in which the stationary source or modification is to be constructed, as allowed under section 173(c)(1) of the CAA.

PART Env-A 618.08 identifies the procedures for documenting emission reductions used for offsets. Among other requirements, the section allows stationary sources subject to the offset

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<sup>1</sup> New Hampshire's few changes to definitions used in the federal regulations and use of several additional clarifying definitions, as explained in this document, are also approvable because they are consistent with all CAA requirements for approval into the SIP.

provisions to use ERCs in accordance with PART Env-A 3006.04. The section also allows DERs to meet the offset requirements, provided the DERs comply with the requirements of section 173 of the CAA, 40 CFR 51.165(a) and PART Env-A 3108.02. As explained below, EPA previously has allowed the use of DERs to meet a CAA emissions requirement. EPA has determined, given the procedures that will apply to the use of DERs and ERCs to meet the NNSR emissions offset requirements, that it is appropriate and consistent with CAA requirements to approve these provisions into New Hampshire's SIP.

In EPA's approval of New Hampshire's Reasonably Available Control Technology (RACT) for Nitrogen Oxide (NO<sub>x</sub>) and Volatile Organic Compounds (79 FR 49458, August 21 2014), EPA allowed stationary sources subject to the State's RACT rule to comply by the purchase and generation of DER credits pursuant to PART Env-A 3100. The approval further states, since PART Env-A 3100 has not been approved into the SIP, any order issued by New Hampshire that allows the use of PART Env-A 3100 to comply with NO<sub>x</sub> RACT will need to be approved into New Hampshire's SIP as a source specific SIP revision.

Similar to the RACT rule, since PART Env-A 3000 and PART Env-A 3100 have not been approved by EPA into the SIP, any NNSR permit issued by New Hampshire that allows for the use of ERCs and/or DERs to meet an offset requirement would first need the ERC or DER offset to be approved by EPA into the SIP *before* the NNSR permit could be issued. Each individual SIP approval of a stationary source's use of DERs and/or ERCs for the purpose of meeting the NNSR emissions offset requirement, would be required to meet the requirements identified in PART Env-A 618.07 and PART Env-A 618.08 and to satisfy all offset and any other relevant

requirements of the CAA before EPA would be able to approve the use of the DERs and/or ERCs into the SIP for a specific proposed new major stationary source or modification.

*D. How did New Hampshire demonstrate that the definitions of “Baseline actual emissions” and “Reasonable period” are as stringent as the corresponding federal definitions?*

1. “Baseline actual emissions” Analysis

The “Baseline actual emissions” definition is used in all major stationary source applicability tests and defines the actual emissions from a stationary source before the project. The difference between the pre-project “actual emission baseline” and the post-project “projected actual emissions” determines the emission increase from a project.

The federal definition of “Baseline actual emissions” at 40 CFR 51.165(a)(1)(xxxv) defines separate baseline emissions calculations for existing electric utility steam generating units (EUSGU) and all other existing emission units other than EUSGU. The key elements of the definition relevant to this document are as follows:

- Existing EUSGU: The owner/operator may select any consecutive 24-month period for each pollutant, without the need for a demonstration, within the 5-year period immediately preceding when the owner/operator begins actual construction of the project. The reviewing authority may allow the use of a different time period upon a determination showing the time period is more representative of normal stationary source operations. A different consecutive 24-month period can be used for each regulated pollutant.

- All other existing emission units: The owner/operator may select any consecutive 24-month period in the 10-year period immediately preceding either the date the owner/operator begins actual construction or the date a completed permit application is received by the reviewing authority for a permit, whichever is earlier. No other different time period is allowed. A different consecutive 24-month period can be used for each regulated pollutant.

The NH DES definition tracks the requirements in 40 CFR 51.165(a)(1)(xxxv) except for the following differences:

- Unlike the federal definitions, the State uses the same definition for EUSGUs and non-EUSGUs.
- Under the State's definition, in establishing baseline actual emissions for a project, the owner/operator presumptively shall select the same consecutive 24-month period for all pollutants; and the consecutive 24-month period shall be selected from within the 5-year period immediately preceding the date when the owner/operator begins actual construction of the project. However, the NH DES shall allow the use of a different consecutive 24-month time period for all pollutants, up to 10 years immediately preceding the date when the owner/operator begins actual construction of the project, or allow the use of a different consecutive 24-month period for different pollutants within that 10 year period, upon determining (after adequate demonstration by the applicant) that the alternative time period is more representative of normal stationary source operations.



Forty CFR 51.165(a)(1) requires that all state plans use the specific definitions as promulgated by EPA. Deviations from the federal wording for each definition will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent in all respects, as the corresponding federal definition.

As part of the December 2002 NSR final rule, EPA prepared a November 21, 2002, “Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules (Supplemental Analysis).” The Supplemental Analysis provided a description of the NSR reform rules and an analysis demonstrating that the reform rule’s environmental benefits were equivalent to or more stringent than the existing pre-reform rules. For the addition of the definition of “Baseline actual emissions,” EPA concluded that the use of a 10 year period to select a baseline is a reasonable period considering the variability of different business cycles. EPA believes the effect from the new definition is small and would not alter the baseline for 90% of the stationary sources. For the remaining 10%, EPA cannot draw general conclusions about how many stationary sources would or would not receive an alternative baseline nor estimate what emission consequences would result. EPA’s complete analysis of the definition of “Baseline Actual Emissions” can be found at <http://www.epa.gov/nsr/documents/nsr-analysis.pdf>.

The NH DES included as part of its SIP submittal a November 16, 2012 memorandum entitled “Supplemental Information for SIP Revision Request Parts of PART Env-A 600, Statewide Permit System.” Similar to the EPA’s study and analysis summarized above in the previous paragraph, the State’s memorandum described the differences between the federal and state

“Baseline actual emissions” definitions and described an emissions study that compares the effects of the state and federal definition on emission changes to actual stationary sources located in New Hampshire. The NH DES’s analysis looked at the federal definition of baseline actual emission, the State’s presumptive or default baseline actual emission method (i.e., 24 consecutive months selected from the 5 years preceding actual construction for all regulated pollutants), and the State’s allowed alternative emission baseline if the owner/operator could demonstrate normal stationary source operations are better represented by:

- use of an alternative 24-consecutive month period selected from the period between 5 to 10 years immediately preceding beginning actual construction, and
- use of different 24-consecutive month periods for different regulated pollutants, within the period between 5 and 10 years immediately preceding beginning actual construction.

For the majority of changes occurring at any type of stationary source, the State’s presumptive or default baseline actual emissions method (using a 24-consecutive month period during the 5 year period immediately preceding beginning actual construction) resulted in the same or lower baseline emissions as compared to the federal definition. For owner/operators that could demonstrate that normal stationary source operations were better represented by 24 consecutive months selected from the 5 to 10 year period preceding beginning actual construction or that different consecutive 24-month periods for different regulated pollutants better represent normal stationary source operations, the analysis showed that the State’s definition resulted in baseline emissions that were at least as stringent in all cases to the federal definition.

EPA therefore concludes that the NH DES’s definition of “Baseline actual emissions” is as stringent in all respects as the federal definition. The State’s definition results in the same

emission baseline for new emission units, changes to existing EUSGUs, and changes at existing units that emit one pollutant and with high utilization rates within the last 5 years. For all other changes, the State's definition allows the use of baselines selected outside of 5 years (but before 10 years) and baselines for each regulated pollutant where appropriately demonstrated to be as stringent. As a result, any difference in the application of the state and federal definitions on the selection of baseline actual emissions would be insignificant at worst and would therefore result in permit applicability decisions, emissions limitations or emissions control requirements that are equally stringent.

## 2. Reasonable Period Analysis

The NH DES's submittal also revised the definition for "Reasonable period." The term "Reasonable period" is used in the definition for "Net emissions increase" and defines the contemporaneous period for the emission increases and decreases that are used in the calculation determining applicability of the NNSR regulations to a particular project. Under §51.165(a)(1)(vi)(C)(1), the reviewing authority is authorized to specify the applicable "Reasonable period." Reviewing authorities typically use the period defined in the federal Prevention of Significant Deterioration (PSD) permitting program. That period begins five years before the date construction of the project commences and ends when the emissions increase from the project actually occurs.

The NH DES's definition for "reasonable period" uses a period that begins five years from the date the NH DES receives a complete permit application for a project and ends upon the "expiration date" of the pre-construction permit issued for the project (at which time a NH DES-

issued state operating permit for the project becomes effective). A “Reasonable period” based on a fixed date (i.e., the receipt of a complete permit application) ensures the stationary source, the permitting authority and the public that the NNSR applicability determination for a stationary source or modification will not change after the state has reviewed a permit application and made a permit decision. Since the 5 year period will not change after the complete permit application is received, all contemporaneous emission increases and decreases used by the stationary source and state to determine NSR applicability will remain in effect.

Under the federal definition, the 5-year period is based on the date construction commences, a date that may change significantly based on the many factors that could delay construction. As a result, the five year contemporaneous period would also be delayed. Emission increases previously within the contemporaneous period could fall outside the contemporaneous period and change the applicability of the stationary source or modification.

In addition, the NH DES version of “Reasonable period” extends out to the expiration date of the “temporary” or preconstruction air permit issued for the project, a date compatible with the NH DES’s air permitting program. Under the NH DES’s permit program, the initial preconstruction permit required before construction begins is referred to as a temporary permit. Temporary permits expire after 18 months. Before expiration, stationary sources must complete construction and begin operational testing or, if construction has not commenced within the 18 months, reapply for a new temporary permit. For those cases where a stationary source has completed construction and has begun to operate, the state and federal terms provide equivalent results. However, for stationary sources and permitting agencies that may have difficulty determining when a new stationary source has begun operating due to various stationary source

startup issues, defining the end date of reasonable period in relation to a fixed permit expiration date (and corresponding permit to operate issuance date) ensures the state agency and the stationary source that NNSR program applicability will not change after initial permit decisions have been reviewed and approved. Considering the benefits of the NH DES's version of "Reasonable period" noted above, EPA concludes the State's term for "reasonable period" is approvable and is as stringent as the federal definition.

*E. What are the provisions that New Hampshire needs to submit in order for the conditional approval to become a full approval?*

The State's proposed SIP revision did not include two provisions that preclude EPA from fully approving the State's proposed NNSR SIP revisions. The first missing provision applies to any regulated NSR pollutant emitted from projects at existing emission units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of 40 CFR 51.165(a)(6)(vi), that a project not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the projected actual method specified in paragraphs (a)(1)(xxviii)(B)(1) through (3) for calculating projected actual emissions. These specific procedures include additional monitoring, recordkeeping and reporting for those projects that exceed 50% of the significant emission increase and significant net emission increase for the applicable pollutant. The NH DES has committed by letter dated March 20, 2015 to submit for EPA approval into the SIP in a timely manner provisions that meet the requirements at 40 CFR 51.165(a)(6) and (a)(7) so that EPA may at that time fully approve the NH DES's NNSR program.

The second missing provision from NH DES's submittal is the requirement at 40 CFR 51.165(a)(5)(i) that a State approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law. This provision, originally part of the SIP and unintentionally left out of the November 15, 2012 SIP submittal, affirms that sources subject to the NNSR program must continue to comply with all other applicable state and federal requirements. The NH DES has committed by letter dated March 20, 2015 to submit for EPA approval into the SIP in a timely manner provisions that meet the requirements at 40 CFR 51.165(a)(5)(i) so that EPA may at that time fully approve the NH DES's NNSR program.

**VI. What action is EPA proposing for New Hampshire's July 21, 2003 SIP submittal to its PART Env-A 101: Permit definitions?**

New Hampshire July 23, 2003 SIP submittal clarifies how the State addresses minor changes to the permit terms contained in "Temporary Permits" (i.e., preconstruction air quality permits) and "State Permits to Operate" issued under the State's PART Env-A 600, Statewide Permit System. The current SIP-approved rules do not have definitions sufficient to address minor changes to existing permit terms or conditions for stationary sources, where the changes would *not*: a) result in an increase in the amount of a specific air pollutant emitted by the source or device; (b) result in the emission of any additional air pollutant; or (c) necessitate the use of permit notice and hearing procedures.

To address such minor changes to existing permit terms, the SIP submittal included definitions for the terms for “minor permit amendment” and “state permit to operate.” The term “minor permit amendment” provides for minor changes to conditions in permits other than Title V permits (which are not issued pursuant to SIP regulations). The term “state permit to operate” means a non-Title V operating permit issued prior to operation or material modification of a stationary source, area stationary source or device. Both definitions are consistent with all federal requirements under the CAA for approval into the SIP.

## **VII. Proposed Action**

EPA is proposing to *conditionally* approve the NH DES’s November 15, 2012 PSD Program submittal originally proposed to be fully approved by EPA on January 21, 2015. The repropoed, conditional approval of the PSD program is conditioned on the State submitting in a timely manner a SIP revision that adds a provision, consistent with 40 CFR 51.166(q)(2)(iv), requiring notice of a draft PSD permit to state air agencies whose lands may be affected by emissions from the permitted source.

EPA is also proposing to conditionally approve PART Env-A 618 “Nonattainment New Source Review,” because the NH DES must submit to EPA in a timely manner additional provisions that comply with 40 CFR 51.165(a)(6) and (a)(7) and 40 CFR 51.165(a)(5)(i), i.e., 1) provisions for “reasonable possibility” established in 40 CFR 51.165(a)(6) and (a)(7); and 2) provisions required under 40 CFR 51.165(a)(5)(i) providing that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law.

Under section 110(k)(4) of the Act, EPA may conditionally approve a State's plan based on a commitment from the State to adopt specific enforceable measures by a date certain, but not later than 1 year from the date of final conditional approval. By letter dated March 20, 2015 New Hampshire has committed to revising its regulations to be consistent with EPA's regulations not later than one year after EPA's publication of a notice of final conditional approval. If the State fails to do so in a timely manner, this conditional approval will, by operation of law, become a disapproval one year from publication of that notice of final conditional approval. At that time, the conditionally approved SIP revisions would not be part of New Hampshire's approved SIP. If that were to occur, EPA would then also notify the State by letter. EPA subsequently would publish a notice in the **Federal Register** notifying the public that the conditional approval automatically converted to a disapproval. If the State meets its commitment within the applicable time frame, however, EPA would subsequently publish a notice in the **Federal Register** notifying the public that EPA intends to take final action to approve or disapprove the State's revised regulations. If EPA were to approve the revised regulations, the regulations would be fully approved in their entirety and replace the conditionally approved provisions of the State's SIP regulations.

Finally, EPA is proposing to fully approve the definitions at PART Env-A 101.174 "Minor permit amendment" and PART Env-A 101.262 "State permit to operate" submitted to EPA on July 21, 2003.

## **VIII. Incorporation by Reference**



In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the following NH DES rules: the PSD rules at PART Env-A 619, “Prevention of Significant Deterioration” (originally proposed on January 21, 2015) as discussed in Section IV of the preamble; the NNSR rules at PART Env-A 618, “Nonattainment New Source Review” discussed in Section V of the preamble; and the definitions for “minor permit amendment” and “state permit to operate” under PART Env-A 101, “Permit Definitions” as discussed in section VI of the preamble. EPA has made, and will continue to make, these documents generally available electronically through [www.regulations.gov](http://www.regulations.gov) and/or in hard copy at the U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics and Indoor Programs Unit, 5 Post Office Square - Suite 100, (mail code OEP05-2), Boston, MA 02109 - 3912

## **IX. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country

located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 8, 2015.

H. Curtis Spalding,  
Regional Administrator,  
EPA New England.

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